

EXHIBIT B

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Consolidated Request for Review by)	CC Docket No. 02-6
Send Technologies, LLC of)	
Decisions of Universal Service Administrator)	
Regarding Union Parish School Board)	
)	

To: The Commission

CONSOLIDATED REQUEST FOR REVIEW

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SUMMARY

In 1999, Union Parish School Board (“Union Parish”), a school system in Farmerville, Louisiana, filed applications for funding for a variety of services offered through the universal service support mechanism for schools and libraries (“E-rate Program”). The Technology Systems Administrator for Union Parish, Tom Snell, was listed as the contact person on Union Parish’s Form 470 applications.

Snell holds a fifteen percent minority, non-controlling unitholder interest in a technology services company, Send Technologies (“Send”). Snell is not now, nor has he ever been, an employee of Send, and Snell has never undertaken any operational responsibility for Send. Snell is a passive investor. As described herein, immediately upon learning that Send had responded to Union Parish’s Form 470 applications with competitive bids, Snell informed the Superintendent of Union Parish, who sought and received a specific determination that Snell’s unitholder interest would not pose a conflict of interest under Louisiana state law if Send were awarded E-rate contracts. Notwithstanding the specific finding that Snell did not have a conflict of interest, out of an abundance of caution Union Parish walled Snell off and insulated him from the Union Parish competitive bidding process for E-rate services and subsequent decision making involving Send in order to ensure a full and fair competitive bidding process, both in reality and perception.

In 1999 and even today, the FCC’s rules on competitive bidding do not address such conflicts of interest, but they do require compliance with local and state competitive bidding and procurement laws – which Union Parish observed. Union Parish received a determination from the State of Louisiana that Snell’s unitholder interest in Send did not pose a conflict of interest. This is significant, since the FCC’s rules specifically provide that the federal law is not intended

to preempt the state law on such matters. The Schools and Libraries Division (“SLD”) of the Universal Service Administrative Company (“USAC”) also did not have any Support Mechanism rules in place in 1999 that would have provided further direction to Union Parish on conflict of interest issues. Union Parish complied with all known federal, state and local competitive bidding rules with respect to the E-rate Program.

Through the competitive bidding process, Send was found to be the low-cost provider for Internet access services and internal connections, and it was awarded contracts to provide those services in 1999 and 2000. Union Parish’s Form 470 applications, which are the subject of this Request for Review, were granted in 1999 and 2000. In reliance on such grants, valuable Internet access services and internal connections were provided by Send and paid for by Union Parish.

On January 31, 2003, three years after the applications were granted and funded, the SLD issued Commitment Adjustment Letters seeking to void the granted applications and rescind the funding already allocated pursuant to the applications. The stated basis for the “adjustments” emanated from Commission precedent regarding competitive bidding that was adopted years after the Union Parish applications were granted. Based on this precedent, which can be easily distinguished from the facts in the Union Parish case, the SLD asserted that Union Parish’s Form 470s contained “service provider contact information” which violated the intent of the competitive bidding process. Union Parish’s Form 470 applications do not contain “service provider contact information,” but they were nevertheless declared invalid and all funding related thereto was rescinded.

Send filed with USAC a consolidated letter appeal on April 1, 2003, which was denied on October 17, 2003. The Administrator stated in its denial, among other things, that “the

authorized contact person listed on the Form 470 cannot be associated in any way with a service provider as this violates the intent of the bidding process.” Again, the precedent that forms the basis of the Administrator’s assertion is based upon FCC cases that are factually inapplicable to the Union Parish case, and were decided years after the Union Parish applications were granted and funded.

The primary issues for the Commission’s consideration in this Request for Review are:

(1) whether unitholder interests held by an employee of Union Parish in a service provider amounted to a prohibited conflict of interest under applicable law and compromised Union Parish’s competitive bidding process under the E-rate Program; (2) whether the competitive bidding process undertaken by Union Parish complied with the letter, spirit and intent of the Commission’s competitive bidding rules; (3) whether Commission precedent regarding competitive bidding from 2001 (and thereafter) can be properly applied to Union Parish’s applications, granted in 1999 and 2000; (4) whether USAC exceeded its authority when it interpreted such later-adopted FCC precedent and retroactively applied it to Union Parish’s granted applications; (5) whether the Administrator exceeded its authority in applying Part 48 federal procurement rules to Union Parish’s case, which the Commission has acknowledged are wholly inapplicable to the E-rate Program; and (6) whether the facts of Union Parish’s case warrant waiver of the Commission’s competitive bidding rules.

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CONSOLIDATED REQUEST FOR REVIEW

Send Technologies, LLC (“Send”), through counsel, and pursuant to Section 54.719(c) of the Commission’s rules,¹ hereby submits this Consolidated Request for Review (“Request for Review”) seeking reversal of three decisions of the Administrator of the Universal Service Administrative Company (“Administrator” or “USAC” respectively), issued on October 17, 2003,² denying Send’s Consolidated Letter of Appeal (“Appeal”).³ Send’s Appeal, filed on April 1, 2003, sought the reversal of five Commitment Adjustment Letters (“CALs”) issued by USAC’s Schools & Libraries Division (“SLD”) on January 31, 2003 to Send and Union Parish

¹ 47 C.F.R. § 54.719(c).

² Letters from the Universal Service Administrative Company to Mark Stevenson, President, Send Technologies, LLC regarding Union Parish School Board (Oct. 17, 2003) (“*Administrator’s Decision on Appeal*”), attached hereto as Exhibit 1.

³ Letter from Mark Stevenson, President, Send Technologies, LLC to the Universal Service Administrative Company, Schools and Libraries Division regarding appeal of commitment adjustment letters (Apr. 1, 2003) (“Appeal”), attached hereto as Exhibit 2.

School Board located in Farmerville, Louisiana (“Union Parish”).⁴ The CALs seek to rescind over \$300,000.00 in federal funding awarded to Union Parish in 1999 and 2000 for internal connections and Internet access services provided by Send through the universal service support mechanism for schools and libraries (“E-rate Program”). Although Send appealed all five CALs, the Administrator denied Send’s Appeal with respect to only three CALs and \$167,024.40 in federal funding.⁵ The additional two CALs remain pending before the Administrator. This Request for Review seeks consolidation because the Administrator’s stated reason for denying Send’s Appeal with respect to each CAL is the same:

After a thorough review of the appeal, [and] upon review of the documentation (audit report from the State of Louisiana Legislative Auditor) which was obtained by the SLD[, it] was determined that Mr. Tom Snell who is the authorized contact person listed on the cited Form 470 . . . , also has a 15% ownership interest in the selected service provider (Send Technologies, LLC) as listed on the Form 471 application. *According to the rules of the Support Mechanism . . . this is considered to be a conflict of interest . . . and is in violation of the competitive bidding guidelines, as the authorized contact person listed on the Form 470 cannot be associated in any way with a service provider as this violates the intent of the bidding process regarding fair and open competition.*⁶

⁴ Letters from the Universal Service Administrative Company to Mark Stevenson, President, Send Technologies, LLC regarding commitment adjustments (Jan. 31, 2003) (“CALs”), attached to Appeal as Exhibits 1-5.

⁵ Filing information regarding the three CALs at issue in the Request for Review is as follows: (1) Funding Year: 1999-2000, Form 471 Application Number: 119672, Billed Entity Number: 139313, FRN: 171021, rescission of \$23,124.00; (2) Funding Year: 2000-2001, Form 471 Application Number: 160965, Billed Entity Number: 139313, FRN: 385823, rescission of \$63,000.00; and (3) Funding Year: 2000-2001, Form 471 Application Number: 163210, Billed Entity Number: 139313, FRN: 405241, rescission of \$80,900.40.

⁶ Appeal at 3 (emphasis added). Among the documents the Administrator reviewed in making its decision in Send’s Appeal was an audit report of the E-rate Program produced by Louisiana’s former legislative auditor, Daniel Kyle. *E-Rate Program, Investigative Audit, State of Louisiana Legislative Auditor Daniel G. Kyle, Ph.D.* (Jan. 15, 2003). The audit solely addresses E-rate billing discrepancies that, as Kyle acknowledges in the report, Send promptly resolved. The billing discrepancies were not material and amounted to 2% of Send’s overall revenue. Most importantly, the audit report does not address any of the SLD’s concerns that are at issue in this Request for Review. Kyle later referred the audit to local law enforcement officials, but such audit referrals are required under state law. As the SLD

Rules of the Support Mechanism require the applicant to provide a fair and open competitive bidding process. Per the SLD website, “. . . *A conflict of interest exists, for example, when an applicant’s contact person, who is involved in determining the services sought by the applicant and who is involved in the selection of the applicant’s service providers, is associated with a service provider that was selected.*” Since the applicant’s consultant/contact person in this case has been determined to have a 15% ownership interest in the selected service provider from whom the applicant is requesting services, all funding requests that are associated with the cited Form 470 must be denied. Consequently, the appeal is denied.⁷

Conflict of interest principles that apply in competitive bidding situations include preventing the existence of conflicting rules that could bias a contractor’s judgment, and preventing unfair competitive advantage . . . (See, e.g., 48 C.F.R., §9.505(a), (b).)⁸

FCC rules require applicants to seek competitive bids and in selecting a service provider to carefully consider all bids. FCC rules further require applicants to comply with all applicable state and local competitive bidding requirements. In the May 23, 2000 *MasterMind Internet Services, Inc.* (MasterMind) appeals decision, the FCC upheld SLD’s decision to deny funding where a MasterMind employee was listed as the contact person on the FCC Form 470 and MasterMind participated in the competitive bidding process initiated by the FCC Form 470. The FCC reasoned that under those circumstances, the Forms 470 were defective and violated the Commission’s competitive bidding requirements, and that in the absence of valid Forms 470, the funding requests were properly denied. Pursuant to FCC guidance, this principle applies to any service provider contact information on an FCC Form 470 including address, telephone and fax numbers, and e-mail address.⁹

is aware, however, state and local law enforcement officials in Louisiana reviewed the audit and declined to pursue any action against Send.

⁷ *Administrator’s Decision on Appeal* at 2-3 (emphasis added). The “Support Mechanism” referred to above is the E-rate Program, which provides universal service support to schools and libraries. The “rules of the Support Mechanism” refer to those guidelines and procedures adopted by the SLD and posted on its website as part of its administration of the E-rate Program.

⁸ *Id.* at 3.

⁹ *Id.*

The Commission should overturn the Administrator's decision, and direct the SLD to withdraw the CALs because: (1) There was no prohibited conflict of interest under applicable law that compromised Union Parish's competitive bidding process; (2) Union Parish complied with the letter and spirit of all applicable competitive bidding rules and the intent underlying such rules; (3) Later-adopted Commission precedent regarding the competitive bidding rules, including the *MasterMind* cases, is inapplicable to Union Parish's granted applications and involves easily distinguishable facts; (4) The SLD and the Administrator exceeded their authority when they interpreted current Commission precedent regarding the competitive bidding rules and retroactively applied such interpretations to Union Parish's E-rate applications granted in 1999 and 2000; and (5) The Administrator exceeded its authority when it justified its actions in the Union Parish case by relying on Part 48 regulations that are wholly inapplicable to the E-rate Program.

I. SEND TECHNOLOGIES' INTEREST IN THE MATTER PRESENTED FOR REVIEW.

Pursuant to Section 54.719 of the Commission's rules,¹⁰ any party aggrieved by an action taken by the SLD or the Administrator may appeal that decision, including service providers and applicants. Send is an interested party in this matter because it is the service provider to whom the SLD issued the commitment adjustment letters seeking to rescind a total of over \$300,000 in federal funding, of which \$167,024.40 is subject to the Request for Review.

¹⁰ 47 C.F.R. § 54.719.

II. STATEMENT OF FACTS.¹¹

A. Union Parish School Board.

Union Parish, a school system in Farmerville, Louisiana, participates in the E-rate Program to obtain funding for basic telecommunications, Internet services and internal connections. Pursuant to FCC, USAC and state competitive bidding rules, Union Parish sought bids for E-rate services beginning in 1998 and submitted the appropriate Form 470 applications to the SLD.¹² This Request for Review relates to applications for E-rate support filed by Union Parish on January 22, 1999 (*Application No. 119672, granted on July 8, 1999*), and December 1, 1999 (*Application Nos. 160965 and 163210, granted on April 17, 2000 and July 28, 2000, respectively*).

B. Tom Snell.

At the time the applications were filed, Tom Snell was the Technology Systems Administrator for Union Parish. Thus, Union Parish listed him as the contact person for the school system on its Form 470s. Snell did not sign any Form 470 or Form 471 for the funding years in question.

Snell holds a fifteen percent minority, non-controlling unitholder interest in a technology services company, Send Technologies. Snell is not now, nor has he ever been, an employee of Send, and Snell has never undertaken any operational responsibility for Send. Snell is a passive

¹¹ Attached hereto are declarations of Tom Snell, Mark Stevenson and Donna Cranford, all of whom have personal knowledge of the facts set forth herein.

¹² Schools and libraries seeking discounts under the E-Rate Program must file with the SLD a Form 470 application to start the competitive bidding process. A Form 470 describes the telecommunications services, Internet access and internal connections for which an applicant is seeking discounts. The SLD posts the Form 470s on its website where service providers may review them and then submit bids to the applicants for services they seek to provide to the applicants.

investor. Snell's ownership interest in Send is not attributable under applicable Louisiana state and local law. As described below, immediately upon learning that Send had responded to Union Parish's Form 470 applications with competitive bids, Snell informed the Superintendent of Union Parish who sought and received a specific determination that Snell's unitholder interest would not pose a conflict of interest under Louisiana state law if Send were awarded E-rate contracts. Notwithstanding the specific finding that Snell did not have a conflict of interest, he was nevertheless insulated from the Union Parish competitive bidding process for E-rate services, and subsequent decision making involving Send, in order to ensure a full and fair competitive bidding process, both in reality and perception.

It was impossible for Union Parish to know when it filed its initial Form 470 that in listing Tom Snell, its own Technology Systems Administrator as the contact person, it would, in retrospect, raise a theoretical question about the fairness of its competitive bidding process because Send would later bid for Union Parish's services.

C. FCC Competitive Bidding Rules in 1999.

At the time Union Parish filed its Form 470s, very little guidance was available to participants in the E-rate Program regarding the FCC's competitive bidding requirements. The competitive bidding rules at that time provided, and still provide:

§54.504 Requests for Services.

(a) Competitive bid requirements. Except as provided in § 54.511(c), an eligible school, library, or consortium that includes an eligible school or library shall seek competitive bids, pursuant to the requirements established in this subpart, for all services eligible for support under §§ 54.502 and 54.503. These competitive bid requirements apply in addition to state and local competitive bid requirements and are not intended to preempt such state or local requirements.

The FCC's rules regarding the E-rate Program have never defined prohibited associations, attributable interests, or other conduct that may represent a conflict of interest and a violation of the E-rate competitive bidding rules. To Send's knowledge, the Support Mechanism rules of the SLD from 1999 also did not contain any guidance. The only other direction regarding competitive bidding procedures available to applicants like Union Parish in 1999 was outlined in broad language in the Commission's *Universal Service Order*.¹³ The *Universal Service Order* spoke in generalities about the competitive bidding process:

Competitive bidding is the most efficient means for ensuring that eligible schools and libraries are informed about all of the choices available to them. Absent competitive bidding, prices charged to schools and libraries may be needlessly high, with the result that fewer eligible schools and libraries would be able to participate in the program or the demand on universal service support mechanisms would be needlessly great.¹⁴

. . . .

[A]lthough we do not impose bidding requirements, neither do we exempt eligible schools or libraries from compliance with any state or local procurement rules, such as competitive bidding specifications, with which they must otherwise comply.¹⁵

The FCC Form 470 used by E-rate applicants in 1999 asked for the name and contact information for the person to be contacted for questions regarding the form.¹⁶ It did not seek information regarding the applicant's relationships with possible vendors and did not provide any information that would put applicants on notice that certain relationships between applicants and service providers could render the applications invalid. The FCC modified the Form 470 in

¹³ *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776 (1997) ("*Universal Service Order*").

¹⁴ *Id.* at 9029.

¹⁵ *Id.* at 9030.

¹⁶ FCC Form 470 (Dec. 1998).

September 1999, but it again failed to address any restrictions that may apply to the person listed as an applicant's contact.¹⁷ The FCC, in fact, did not amend the Form 470 to instruct applicants regarding the contact information provided on the form until April 2002, well after Union Parish's Form 470s were filed and granted.¹⁸

In compliance with FCC, USAC and Louisiana state rules in effect in 1999, Union Parish undertook, in good faith, a competitive process in which it sought competitive proposals for a variety of services.

1. Union Parish Sought Competitive Bids.

For each program year, Union Parish sought competitive bids as required under FCC rules by posting its Form 470 application on the SLD website. In its first program year, Union Parish exceeded the Commission's requirements by also actively soliciting quotes from local and national service providers for the school system's services. Union Parish issued additional bid solicitations in order to increase its opportunities to find service providers that would bid on services to rural schools like Union Parish's. Attracting the attention of service providers in rural areas was a difficult task in 1998, 1999 and 2000, but is less so today. Quotes were specifically solicited from LDS, BellSouth, and UUNet Technologies, Inc. Donna Cranford, business manager for the school board, solicited the service quotes.¹⁹ Send provided quotations for Internet services in 1999 and 2000 and for internal connections services in 2000. In response to its Form 470, Union Parish also received inquiries from other vendors. Mastermind Internet Services submitted an inquiry regarding Internet services in 1999 and Icon Technologies

¹⁷ FCC Form 470 (Sept. 1999).

¹⁸ FCC Form 470 (Apr. 2002).

¹⁹ Memorandum from Donna Cranford, Business Manager of Union Parish, to Finance Committee Members (May 11, 1998) ("Cranford Memo"). Attached to Appeal as Exhibit 10.

submitted inquiries in 1999 and 2000 for Internet services and internal connections. The costs of services to be offered by the other vendors were judged by Union Parish to be several times greater than the proposal of Send for Internet access services and certain internal connections. Union Parish also observed three surrounding parishes who contracted for internal connections services with Icon Technologies, CompStar Plus, and FirstCo, all at significantly higher cost for less service. Union Parish decided to purchase internal connections equipment from a variety of vendors.

Upon receiving inquiries and contract bids for various services in each funding year, Union Parish's superintendent evaluated the inquiries and bids (the evaluation and decision making process is described in more detail, *infra* pp. 8-11). Because Send's service proposals would cost Union Parish one-fifth to one-half of what the other service providers offered for comparable services, Union Parish chose Send to provide it with Internet services in 1999 and 2000 and certain internal connections in 2000. Various other vendors were selected by the district to provide telecommunications and internal connections for each year.²⁰ In funding years 1999 and 2000, Union Parish selected the following service providers for the following services: Diversifire Inc. (wire plan installation); Global Data Systems Inc. (routers and switches), Anixter Corporation (wire and terminations), Dell Marketing Inc. (servers), BellSouth (T-1 circuits and phone lines), CenturyTel (T-1 Circuits and phone lines), AT&T (long distance services) and McKee Electronics (phone system).

Although bids may be accepted based upon factors independent of the cost of services, the Commission recommends that cost should be the most relevant factor when an applicant is reviewing bids for services. The theory, presumably, is that if an applicant chooses the lowest

²⁰ See Appeal at Exhibit 13.

cost provider, there is a presumption that their decision was not coerced for other illegitimate reasons but, rather, driven by the bottom line.²¹

With respect to the competitive bidding process undertaken by Union Parish in each program year, Send participated only as a bidding vendor.

2. Union Parish Also Complied with Local and State Competitive Bidding and Procurement Laws.²²

After initial bids for E-rate services were received by Union Parish, Snell learned that Send had responded to Union Parish's Form 470 by submitting a bid for certain services. Snell immediately disclosed his minority interest in Send to the appropriate local government officials who sought a determination about whether Snell's ownership interest presented a conflict of interest or violated any local procurement regulations for competitive bidding. Snell contacted Mr. Mike Lazenby, Superintendent of Union Parish from 1998 – 2001, who in turn contacted Mr. Steve Katz, attorney for Union Parish, and requested legal clarification of Snell's status with

²¹ See generally *Universal Service Order*, 12 FCC Rcd at 9029-30; see also, *Request for Review of the Decision of the Universal Service Administrator by Ysleta Independent School District, El Paso, Texas*, CC Docket No. 96-45, FCC No. 03-313 at 50 (Dec. 8 2003) ("Ysleta").

²² In *Request for Review by the Dept. of Education of the State of Tennessee of the Universal Service Administrator*, 14 FCC Rcd 13734 (1999), an applicant for the E-rate Program chose a vendor that was not the low cost provider, and a company that did not win the bid appealed to the SLD. The SLD concluded that it would "defer to the state and local competitive bid procurement review procedures and findings." *Id.* at 13737 (citation omitted). The FCC upheld this portion of the SLD's decision, noting:

We expect that we can generally rely on local and/or state procurement processes that include a competitive bid requirement as a means to ensure compliance with our competitive bid requirements. That is, we believe it is sensible, as the Administrator did, to rely on state and/or local procurement rules and practices for determining compliance with our competitive bid requirements because such rules and practices will generally consider price to be a "primary factor," and select the most cost-effective bid.

Id. at 13739.

respect to any potential conflict of interest under the circumstances. Mr. Katz researched the appropriate state laws and provided the Superintendent with a written opinion that Snell's ownership interest in Send did not pose a conflict of interest under state law and complied with state ethics regulations.²³ Mr. Katz also requested and eventually received a written ruling from the State Ethics Board that under Louisiana law no conflict of interest existed.²⁴

Although neither local nor state authorities found that Snell's ownership interest created a prohibited conflict of interest, out of good faith concern for the competitive bidding process, Mr. Lazenby instructed Snell that any proposal or contract negotiations or decisions involving Send would be conducted by the school board or the Superintendent. After Lazenby concluded that Send offered the most cost-effective service proposal for Union Parish, the Business Manager for Union Parish provided a disclosure declaration to the school board regarding Snell's investment.²⁵ Snell did not negotiate or execute any contract between Union Parish and Send.

Superintendent Lazenby continued to personally evaluate proposals and conduct negotiations in each successive funding year, and he initiated and approved all contracts with Send. Even though Snell had no conflict of interest under applicable Louisiana law, Union Parish, out of an abundance of caution and in an effort to avoid even the appearance of impropriety, went to great lengths to assure that a full and fair competitive process was

²³ See Appeal at Exhibit 7.

²⁴ Disclosure of all information was made to the district independent auditors in 1998 and each year thereafter. The independent auditors examined all transactions during the years in question and found no evidence of undue influence or a conflict of interest that would warrant exception. After the State audit report, the district independent auditors re-examined events regarding the State audit report and re-affirmed concurrence with their previous opinions of no exception. See *id.* at Exhibit 9.

²⁵ See *id.* at Exhibit 8.

undertaken, and that its business with Send was conducted at arm's length, and without any involvement by Snell, either in reality or in perception.

When Snell was appointed Superintendent of Union Parish in 2001, a challenge regarding Snell's relationship with Send prompted an audit at the state level. The audit addressed whether Snell's unitholder interest in Send violated local or state procurement requirements. The standard in Louisiana is contained in the Code of Governmental Ethics at LSA R.S. 42:1101 et seq. at R.S. 42:1111C(2):

No public servant and no legal entity in which the public servant exercises control or owns an interest in excess of twenty-five percent, shall receive any thing of economic value for or in consideration of services rendered, or to be rendered, to or for any person during his public service....

Following an investigation, the Louisiana Board of Ethics confirmed that Snell's investment in Send, and the contract between Send and Union Parish, complied with state laws.

In a letter to Snell dated January 24, 2002, the Louisiana Board of Ethics found the following:

The Board of Ethics, at its January 16, 2002 meeting, considered an investigation report generated as a result of allegations that you worked for and owned in excess of 25% of a company, Send Technologies, which did business with the Union Parish School Board while you served as an employee of the Union Parish School Board. The investigation report revealed that you owned only 15% of Send Technologies *and that you were not an employee of Send Technologies*. Further, you did not participate in the initial contract between Send Technologies and the Union Parish School Board. . . . Based upon the information obtained, the Board concluded and instructed me to inform you that no violation of the Code of Governmental Ethics was presented by your ownership interest in Send Technologies²⁶

Since the E -rate Program relies on state and local procurement processes to ensure competition, and since the federal requirements are not intended to preempt state and local

²⁶ Letter from Jennifer G. Magness, Louisiana Board of Ethics, to Tom Snell (Jan. 24, 2002) ("Board of Ethics Letter"), attached to Appeal as Exhibit 11.

requirements, the finding of no conflict of interest by the Louisiana Board is significant. Union Parish complied with all relevant state and federal requirements for competitive bidding.

On January 31, 2003, the SLD issued five commitment adjustment letters to Send and Union Parish rescinding funds totaling over \$300,000 that were allocated to them for Internet Services and internal connections in Funding Years 1999, 2000 and 2001.²⁷ The SLD concluded that the Union Parish Form 470s contained service provider contact information, which violated the intent of the competitive bidding process for services under the E-rate Program. The SLD found that, “a competitive bidding violation occurs when a [service provider] associated with the Form 470 participates in the competitive bidding process as a bidder.”²⁸ Send appealed the SLD’s commitment adjustments on April 1, 2003. The Administrator denied Send’s Appeal on October 17, 2003 for the reasons stated on pages 2-3 hereof.

III. QUESTIONS PRESENTED FOR REVIEW.

A. Was There a Prohibited Conflict of Interest Under Applicable Law That Compromised Union Parish’s Competitive Bidding Process?

As previously discussed, the Administrator’s denial of the Appeal states that Snell’s minority interest in Send is a conflict of interest according to the rules of the Support Mechanism. However, no prohibited conflict of interest under applicable law was created by the identification of Snell as the Union Parish contact in the Form 470s at issue here. The designation of Snell as a contact person did not compromise the Union Parish competitive bidding process.

The FCC’s rules addressing E-rate competitive bidding practices have never, and do not today, address or define conflicts of interest in general, or how conflicts may arise by virtue of

²⁷ See *CALs*.

²⁸ See *CALs* at 3.

associations or affiliations between a service provider and a school or library. More specifically, no FCC rules address whether minority, non-controlling unitholder interests held by a school or library employee in a service provider under contract to the school or library might be considered a conflict of interest. The FCC's rules simply provide that applicants must seek competitive bids and comply with state and local procurement regulations. The FCC's rules state that its competitive bidding rules do not preempt state or local rules. To Send's knowledge, the SLD did not have Support Mechanism rules posted on its website in 1999 that addressed conflicts of interest or prohibited associations. Today, the SLD's Support Mechanism rules briefly address conflicts of interest in the "Form 470 Reminders" section of its website.²⁹ The SLD's Support Mechanism rules apparently did not address "prohibited associations" or conflicts of interest that could compromise the competitive bidding process until September 2002 when it posted an announcement on its website with the holding of *MasterMind*.³⁰ The SLD also modified its Service Provider Manual in December 2002 to explain "inappropriate roles for service providers."³¹

The state and local competitive bidding requirements for Louisiana, including Louisiana's conflict of interest rules, to which Union Parish was bound under both FCC regulation and state law, provide that a conflict of interest would be found if a public servant like Snell owned or controlled in excess of 25% of a company with whom the public servant's agency did business. The Louisiana Board of Ethics investigated the matter involving Snell and

²⁹ USAC, Form 470 Reminders, available at http://www.sl.universalservice.org/whatsnew/reminders_f470.asp (last modified April 29, 2003).

³⁰ USAC, September 2002 Announcements, available at <http://www.sl.universalservice.org/whatsnew/2002/092002.asp>.

³¹ USAC, Service Provider Manual, Chapter 5 – Service Provider Role in Assisting Customers, available at <http://www.sl.universalservice.org/vendor/manual/chapter5.asp> (last modified Dec. 11, 2002).

Send and found that Snell owned only 15% of Send and that he was not an employee of Send.

The Ethics Board also found:

Snell did not participate in the initial contract between Send Technologies and the Union Parish School Board. . . . Based upon the information obtained, the Board concluded and instructed me to inform you that no violation of the Code of Governmental Ethics was presented by your ownership interest in Send Technologies.

Based upon the state of Louisiana finding that Snell committed no ethical violation, the absence of FCC rules addressing conflict of interest issues in these circumstances and the FCC's conclusion that its competitive bidding rules do not preempt state and local rules, the Commission must find that Snell did not have notice that his minority ownership interest in the school's service provider could raise a prohibited conflict of interest.

Moreover, Union Parish undertook a full and fair competitive bidding process, in good faith, and there is no evidence that the bidding process was affected in any way by Snell's minor holdings in the eventual winning service provider for two services. Although Snell was found by a state agency not to have violated any ethics rules, he nonetheless was insulated from the competitive bidding process in order to alleviate any concerns over perceived conflicts of interest. Accordingly, Union Parish complied with all federal, state and local competitive bidding rules that were in effect for the years in question.

B. Beyond Complying with the Competitive Bidding Rules, Did Union Parish Comply with the Underlying Intent of the Competitive Bidding Process?

1. Union Parish's Competitive Bidding Process Fulfilled the Underlying Intent of the Competitive Bidding Process.

The requirement for an E-rate Program competitive bidding process derives from Section 254(h)(1)(B) of the Communications Act, as amended,³² which provides that discounts under the

³² Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 251 *et seq*; see 47 U.S.C. § 254(h)(1)(B).

schools and libraries universal service support mechanism must be given only for services provided in response to bona fide requests for services. Bona fide requests require fiscal responsibility by the applying schools and libraries and contracts with such applicants must be formed through a competitive bidding process. The competitive bidding process ensures that a school or library seeking support will obtain the most cost-effective services available, thereby lessening the applicant's demand on universal service funds and increasing funds available to other applicants.³³

The intent of the E-rate Program competitive bidding process, to ensure that Union Parish would obtain the most cost-effective services available, was not violated simply because Snell was listed as the contact person for Union Parish. The bright line analysis applied by the Administrator ignores the facts of this particular case. What is germane is that Union Parish undertook, in good faith, a full and fair competitive bidding process and received Internet services at less than half the cost of services offered by Send's competitors. Union Parish also received internal connections at rates that were a fraction of the costs offered by other competitors. (*See discussion supra* pp. 5-10). By obtaining services at the lowest costs possible, Union Parish lessened its own demands on universal service funds and increased funds available to other applicants. Thus, the process Union Parish went through to choose Send explicitly met the public policy objectives that underlay the competitive bidding rules.

2. Later-Adopted Commission Precedent Regarding Competitive Bidding is Inapplicable to the Union Parish Case.

The SLD's *post hoc* objection to Union Parish's Form 470 was based upon its conclusion in 2003 that Union Parish's Form 470 applications filed in 1999 contained "service provider

³³ *See Universal Service Order*, 12 FCC at 9028-29.

contact information” which, according to the SLD, constitutes a *per se* violation of the intent of the competitive bidding process. In its Appeal, Send demonstrated that Union Parish’s applications did not, in fact, contain service provider contact information.³⁴ Rather, the applications listed an employee of the school system as its contact person. In denying the Appeal, the Administrator characterized its objection to Union Parish’s applications somewhat differently from the SLD, stating that the authorized contact person on a Form 470 cannot be “associated” in any way with a service provider as this violates the intent of the bidding process.³⁵ The Administrator also states that “any service provider contact information” on an FCC Form 470 violates competitive bidding requirements.³⁶

The SLD’s and the Administrator’s conclusions both rely upon a line of Commission decisions beginning in May of 2000 with *MasterMind Internet Services, Inc.* (“*MasterMind*”).³⁷ The Administrator’s denial of the Appeal in this matter is based more upon Commission precedent adopted in later cases beginning in March of 2001, well after the Union Parish applications were granted and funded.

As discussed *infra* pp. 20-30, the holdings of the *MasterMind* cases cannot be retroactively applied to Union Parish’s applications, which were granted and funded in 1999 and 2000. Even assuming, *arguendo*, that the later-adopted Commission precedent could be validly applied to Union Parish, the facts in those cases can be easily distinguished from the Union Parish case.

³⁴ See Appeal.

³⁵ See Administrator’s Decision on Appeal.

³⁶ *Id.*

³⁷ *Request for Review of Decisions of the Universal Service Administrator by MasterMind Internet Services, Inc.*, 16 FCC Rcd 4028 (2000) (“*MasterMind*”).

In *MasterMind*, the Commission addressed for the first time when the E-rate Program competitive bidding requirements and the intent of the competitive bidding process are violated. *MasterMind* and its progeny generally hold that where a Form 470 lists a contact person for the applicant who is an employee or representative of a service provider, the Form 470 is *per se* defective.³⁸ In the most recent *MasterMind*-type case, *Dickenson*, the Commission interpreted the *MasterMind* precedent as follows:

In *Mastermind Internet Services, Inc.*, the Commission held that, where an FCC Form 470 lists a contact person who is an employee or representative of a service provider, the FCC Form 470 is defective. The Commission observed that the “contact person exerts great influence over an applicant’s competitive bidding process by controlling the dissemination of information regarding the services requested.” On this basis, the Commission found that “when an applicant delegates that power to an entity that also will participate in the bidding process as a prospective service provider, the applicant irreparably impairs its ability to hold a fair and open competitive bidding process.” It concluded that “a violation of the Commission’s competitive bidding requirements has occurred where a service provider that is listed as the contact person on the FCC Form 470 also participates in the competitive bidding process as a bidder.”³⁹

The facts contained in the various *MasterMind* cases can be easily distinguished from the facts in the Union Parish case. In the original *MasterMind* case (released May 2000), an employee of the service provider (MasterMind) was listed as the contact person on the applicants’ Form 470s and this person prepared and distributed the RFPs to potential bidders. “In so doing, the Applicants surrendered control of the bidding process to an employee of

³⁸ *Request for Review of Decisions of the Universal Service Administrator by Dickenson County Public Schools, Clintwood, Virginia*, 17 FCC Rcd 15747 (WCB 2002) (“*Dickenson*”); *Request for Review of Decisions of the Universal Service Administrator by Consorcio de Escuelas y Bibliotecas de Puerto Rico, San Juan, Puerto Rico*, 17 FCC Rcd 13624 (WCB 2002) (“*Consortio*”); *Request for Review of Decisions of the Universal Service Administrator by College Prep School of America, Lombard, Illinois*, 17 FCC Rcd 1738 (CCB 2002) (“*College Prep*”); *Request for Review of Decisions of the Universal Service Administrator by A.R. Carethers SDA School, Houston, Texas.*, 16 FCC Rcd 6943 (CCB 2001) (“*Carethers*”).

³⁹ *Dickenson*, 17 FCC Rcd at 15748 (quoting *MasterMind*, 16 FCC Rcd at 4032).

MasterMind, a service provider that not only participated in the bidding process, but also was awarded the service contracts.”⁴⁰ Similarly, in *Carethers* (released March 2001), the Commission concluded that the person listed as the contact for a number of applicant schools in various states, Charles Scorpio, was an employee of, or associated with, the service provider.⁴¹ The Commission further clarified its position regarding improper relationships between service providers and applicants in *College Prep*, *Dickenson* and *Consortio*. In these cases, the contact person listed on the Form 470s was an *employee or representative* of a service provider participating in the competitive bidding process.⁴²

The SLD ignored critical factual differences in the Union Parish case from the *MasterMind* line of cases. First, in *MasterMind* and its progeny, the Commission denied the applicants’ requests for funding because in each case an *employee of the service provider* was listed as the contact for the applicant. In this case, however, Snell was an *employee of Union Parish, the applicant*. Snell was not a representative, agent or employee of Send or any other service provider. A service provider was not listed as a contact on Union Parish’s Form 470s. Rather, Snell in his capacity as Technology Systems Administrator for the school system was the most appropriate person to be listed as the contact person on the Form 470s. Thus, the

⁴⁰ *MasterMind*, 16 FCC Rcd at 4033.

⁴¹ *Carethers*, 16 FCC Rcd at 6948-49. The Commission based its conclusion on the fact that Scorpio had an email address through the service provider, had the same address as the service provider, and the contact person listed for the service provider in the SLD’s database had the same last name as Scorpio. The Commission concluded that Scorpio could not be an employee of the schools because the schools were spread over a number of states. It also was never disputed that Scorpio was an employee of the service provider.

⁴² *College Prep*, 17 FCC Rcd at 1745; *Dickenson*, 17 FCC Rcd at 15748; *Consortio*, 17 FCC Rcd at 13626-27. In *College Prep*, the contact person was an officer of a service provider and negotiated the contracts with service providers on behalf of the applicant. In *Dickenson* and *Consortio*, the contact people listed on the applicants’ Form 470s were employees of a service provider.

Administrator erred in finding that Union Parish's Form 470s contained service provider contact information.

Furthermore, unlike *MasterMind* and its progeny, Union Parish did not delegate the task of disseminating information regarding the services requested to Send. Union Parish undertook its own competitive bidding process in good faith, complied with all federal, state and local rules, considered all factors set forth under those rules, and obtained a ruling from the State Ethics Board confirming that Snell had no conflict of interest that would violate the local competitive bidding laws. Snell was walled off from the solicitation and evaluation of bids for any services in which Send was involved as a competing bidder. To further protect the integrity of the process, Snell did not participate in the initial or subsequent contracts between Send and Union Parish. Accordingly, Union Parish conducted a fair and open competitive bidding process and, as a result, entered into the most cost-effective contract for services. Unlike the applicants in the *MasterMind* line of cases, Union Parish's process was wholly consistent with the public interest requirements underlying the competitive bidding process.

Moreover, unlike the *MasterMind* line of cases, in which the applicants knew in advance when they prepared their Form 470s that the listed contact person was an employee of a service provider, Union Parish could not have known at the time it filed its Form 470 that listing Snell as its contact person, would, in retrospect, pose a theoretical threat to the competitive bidding process simply because Send would later submit a bid to provide services.

In each of the *MasterMind* cases the SLD and the Commission ruled on pending applications and funding requests and denied such applications prospectively. In this case, however, the SLD seeks to undo previously granted applications and rescind funding for services already rendered based upon later-adopted Commission precedent.

Importantly, the SLD and the Administrator have not asserted that the competitive bidding process undertaken by Union Parish did not comply with the Commission's rules and state and local competitive bidding requirements. The Administrator's sole focus was on the name of the authorized contact person listed on the Form 470. The conclusion is that because Snell was listed on the Form 470, Union Parish could not have undertaken a competitive bidding process. The facts in this case do not support such a conclusion. The Administrator values form over substance when it suggests that Union Parish's competitive bidding process would have been valid if only it had listed someone else as the contact person. Even if another person had been listed on Union Parish's application, it would not have impacted what was already a full and fair competitive bidding process undertaken by Union Parish in good faith.

Moreover, in the *MasterMind* line of cases, the conflict of interest presented is obvious because in each case the schools delegated their responsibility to undertake competitive bidding to service providers. That is not the case for Union Parish.

The holdings in the various *MasterMind* cases cannot be used as a blunt instrument, or a bright line test, without regard to the individual facts of a case – especially a case like Union Parish's. To do so misses the essential point – the spirit and letter of the competitive bidding rules was observed and the public interest was served by the bidding process undertaken by Union Parish.

C. Did the Administrator Exceed its Authority When it Interpreted Current FCC Precedent Regarding Competitive Bidding and then Retroactively Applied such Interpretations to Union Parish's Granted Applications?

The FCC appointed USAC to administer the schools and libraries universal service support mechanism in 1998. USAC's authority over the E-Rate Program is limited to implementing and applying the FCC's Part 54 rules, and the FCC's interpretations of those rules

as found in agency adjudications.⁴³ USAC is not empowered to make policy, interpret any unclear rule promulgated by the Commission⁴⁴ or to create the equivalent of new guidelines.⁴⁵ The Administrator exceeded its authority in Union Parish's case by imposing its own expanded interpretation of FCC precedent on Union Parish.

1. The Administrator Exceeded its Authority in Interpreting Commission Precedent.

The only FCC rules or precedents regarding competitive bidding that applied to Union Parish in 1999 when it filed its applications required that applicants "shall seek competitive bids" and observe local and state competitive bidding and procurement requirements. Union Parish complied with these requirements and its applications were granted in July 1999, April 2000 and July 2000.

The facts contained in the first *MasterMind* case are wholly inapplicable to Union Parish's case. It was not until March 2001, in *Carethers*, that the Commission first began considering that an "association" with a service provider could run afoul of the competitive bidding requirements.⁴⁶ The Commission also later discussed "associations" with service providers in *College Prep*, *Consortio*, and *Dickenson*.⁴⁷ It is important to note, however, that in

⁴³ 47 C.F.R. § 54.702(c).

⁴⁴ *Id.*

⁴⁵ *Changes to the Board of Directors of the Nat'l Exchange Carrier Ass'n, Inc.*, Third Report and Order, 13 FCC Rcd 25058, 25066-67 (1998) ("*NECA Third Report and Order*").

⁴⁶ *Carethers*, 16 FCC Rcd at 6947-48. The Commission found that contact person on the Form 470 was likely a representative or employee of the service provider, and was married to another employee of the service provider.

⁴⁷ *College Prep*, 17 FCC Rcd at 1741 (stating that the core issue in the case "is whether the individual listed as the contact person on the applicant's FCC Form 470 was in fact associated with the service provider with whom the applicants contracted for service"); *Consortio*, 17 FCC Rcd at 13628 ("The presence of a representative or employee of a Service Provider as the contact on the Form 470, or

all of these cases, beginning with *Carethers* and continuing through *Dickenson*, the contact person listed on the Form 470 was **not** an employee of the school or library but was, rather, “associated with” and employed by the service provider in some capacity. Thus the prohibited “association” the FCC has sanctioned to date is an exclusive association with a service provider, not a situation in which an employee of an applicant might have a minority unitholder interest in a service provider.

Even if the precedent established in *College Prep*, *Consortio*, and *Dickenson* was available to Union Parish in 1999, it is questionable whether Union Parish could have understood that listing its own employee as a contact person on its Form 470 could violate the competitive bidding rules, especially when there were no FCC or SLD rules or guidelines regarding conflicts of interest, Snell’s passive ownership interest in Send was ruled not to be a conflict of interest under Louisiana law, and Snell was insulated from the competitive bidding process. The Administrator’s interpretation of the FCC’s precedent, that an applicant’s contact person cannot be associated with a service provider (even when the contact person is an employee of the school or library), goes beyond the FCC’s interpretation and seems specifically tailored to cast doubt on the Union Parish applications.

2. The Administrator Exceeded its Authority in Retroactively Applying Later-Adopted Commission Precedent to Union Parish’s Granted Applications.

Even assuming, *arguendo*, that the Administrator interpreted FCC precedent correctly, the Administrator exceeded its authority by retroactively applying such precedent to Union Parish’s case. It is a basic tenet of American jurisprudence that if a court overturns its prior

any contact information associated with a service provider on the Form 470, renders that Form 470 invalid.”); *Dickenson*, 17 FCC Rcd at 15749.

precedent in a line of cases, the new precedent is applied prospectively. The court does not re-open every prior case, retroactively apply the new precedent and overturn all prior concluded decisions.⁴⁸

In *RKO General v. FCC*,⁴⁹ the U.S. Court of Appeals for the D.C. Circuit addressed retroactive application of new Commission precedent very clearly:

Although an administrative agency is not bound to rigid adherence to its precedents, it is equally essential that when it decides to reverse its course, it must give notice that the standard is being changed . . . and apply the changed standard only to those actions taken by parties after the new standard has been proclaimed as in effect.⁵⁰

In addition, “an agency may be prevented from applying a new policy retroactively to parties who detrimentally relied on the previous policy.”⁵¹

The FCC’s standard regarding prohibited “associations” and competitive bidding was first announced in *Carethers* in March of 2001. The new standard was not posted to the SLD’s website as a Support Mechanism rule, providing applicants with notice of the changed standard, until September of 2002. Consistent with the finding in *RKO*, new or changed standards can be applied prospectively only to pending or future applications, not retroactively to granted applications.

In addition, Union Parish detrimentally relied on prior SLD action in this case. The SLD granted Union Parish’s Form 470s and distributed monies based upon those approvals. Union

⁴⁸ See generally 28 U.S.C. § 2106 (“The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review.”)

⁴⁹ *RKO General, Inc. v. FCC*, 670 F.2d 215 (D.C. Cir. 1981).

⁵⁰ *Id.* at 223-24, citing *Boston Edison Co. v. PFC*, 557 F.2d 845 (D.C. Cir. 1997) *cert. denied sub nom. Towns of Norwood, Concord and Wellesley, Mass. V. Boston Edison Co.*, 434 U.S. 956 (1988).

⁵¹ *New England Telephone and Telegraph Co. v. FCC*, 826 F. 2d 1101, 1110 (D.C. Cir. 1987) citing *RKO General*, 670 F.2d at 223.

Parish and Send had every reason to conclude that the school system's Form 470s were valid and did not violate the E-rate Program's competitive bidding rules. Union Parish and Send detrimentally relied on the first application granted by the SLD and continued filing applications in successive years, all of which were granted. During that period, Send provided valuable, competitively priced Internet access services and internal connections to Union Parish, all in reliance on the SLD's actions.

There is an extensive body of judicial case law regarding impermissible retroactivity in which the courts discuss basic notions of equity and fairness and detrimental reliance by citizens on prior agency policies.⁵² There is no need to present a full discussion of such retroactivity

⁵² See *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 224 (1988) (J. Scalia concurring) (“[W]here legal consequences hinge upon the interpretation of statutory requirements, and where no preexisting interpretive rule construing those requirements is in effect, nothing prevents the agency from acting retroactively through adjudication.”). See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 293-294 (1974); *SEC v. Chenery Corp.*, 332 U.S. at 194, 202-03 (1947). See also *Verizon Telephone Co. v. FCC*, 269 F.3d 1098 (2001) (“[T]he governing principle is that when there is a ‘substitution of new law for old law that was reasonably clear,’ the new rule may justifiably be given prospectively-only effect in order to ‘protect the settled expectations of those who had relied on the preexisting rule.’”); *Id.* at 1109, citing *Williams Natural Gas Co. v. FERC*, 3 F.3d 1544, 1554 (D.C. Cir. 1993)). Moreover, retroactivity will be denied “when to apply the new rule to past conduct or to prior events would work a manifest injustice.” *Id.* citing *Clark-Cowlitz Joint operating Agency v. FERC*, 826 F.2d 1074, 1081 (D.C. Cir. 1987). To determine whether a manifest injustice will result from the retroactive application of a statute, a court must balance the disappointment of private expectations caused by retroactive application against the public interest in enforcement of the statute. *Demars v. First Serv. Bank for Sav.*, 907 F. 2d 1237, 1240 (1st Cir. 1990) (citing *New England Power v. United States*, 693 F. 2d 239, 245 (1st Cir. 1982)). The D.C. Circuit Court notes that it has not been entirely consistent in enunciating standards to determine when to deny retroactive effect in cases involving “new application of existing law, clarifications and additions” resulting from adjudicatory actions. In *Cassell v. FCC*, the court acknowledges that it has used the five-factor test set forth in *Clark-Cowlitz* as the “framework for evaluating retroactive application of rules announced in agency adjudications.” *Cassell v. FCC*, 154 F.3d 478, 486 (D.C. Cir. 1998) citing *Clark-Cowlitz*, 826 F.2d at 1081. In a subsequent case, the court substituted a similar three-factor test. See *Dist. Lodge 64 v. NLRB*, 949 F.2d 441, 447 (D.C. Cir. 1991) (citing *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971)). Today, the court has moved from multi-pronged balancing tests for impermissible retroactivity in favor of applying basic notions of equity and fairness. See *Cassell*, 154 F.3d at 486 (declining to “plow laboriously” through the *Clark-Cowlitz* factors, which “boil down to a question of concerns grounded in notions of equity and fairness”); *PSCC v. FERC*, 91 F. 3d 1478, 1490 (concluding that “the apparent lack of detrimental reliance . . . is the crucial point [supporting retroactivity]”). In *Chadmoore Communications, Inc. v. FCC*, the court stated that the test it commonly uses to determine whether a rule has retroactive effect is if “it does not impair [] rights a party possessed when it acted, increase [] a party’s liability for past conduct, or impose [] new duties with respect to transactions

here, as the FCC's own decisions in prior SLD matters reflect its own concern about the retroactive application of new precedent.

In a November 5, 1999 Commission decision involving the E-rate Program, the Commission considered a case in which the Prairie City School District ("Prairie City") sought review of an SLD denial of its application for universal service support.⁵³ Prairie City argued that the SLD's denial should be overturned because Prairie City filed its application in reliance on filing guidelines provided by the SLD on its website. The FCC agreed with Prairie City and directed the SLD to issue a new funding commitment decision letter. Citing *Williamsburg-James City*, the Commission found that where an application was submitted before the establishment of a particular and applicable rule, the applicants could not have been aware of the application requirements.⁵⁴

Likewise, the Commission, recently recognized that clarifications of its universal service policies are to be applied prospectively only by the SLD. In *Ysleta*⁵⁵ and *Winston-Salem*⁵⁶ the

already completed." *Chadmoore*, 113 F.2d 235, 240 (D.C. Cir. 1997), citing *DIRECTV, Inc. v. FCC*, 110 F. 3d 816, 825-26 (D.C. Cir. 1997) (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994)).

⁵³ *Request for Review of the Decision of the Universal Service Administrator by Prairie City School District*, 15 FCC Rcd 21826 (CCB 1999).

⁵⁴ *Id.* at 21827, citing *Request for Review of the Decision of the Universal Service Administrator by Williamsburg-James City Public Schools*, 14 FCC Rcd 20152, 20154-55 (1999) ("Williamsburg could not have been aware of the rules of priority at the time it filed its application." Williamsburg's application was also remanded for reprocessing and issuance of a new funding commitment decision letter. The applicant submitted its application in April of 1998 and new rules were adopted by the Commission in June of 1998.).

⁵⁵ *Request for Review of the Decision of the Universal Service Administrator by Ysleta Independent School District, El Paso, Texas*, CC Docket Nos. 96-45, 97-21, FCC No. 03-313 (Dec. 8, 2003) ("*Ysleta*"). In *Ysleta* the Commission addressed multiple requests to review the decisions of the SLD that were filed by E-rate applicants, but combined the requests as they had almost identical fact patterns.

⁵⁶ *Request for Review of the Decision of the Universal Service Administrator by Winston-Salem/Forsyth County School District, Winston-Salem, North Carolina*, CC Docket Nos. 96-45, 97-21, FCC No. 03-314 (Dec. 8, 2003) ("*Winston-Salem*").

Commission clarified that a party submitting a bona fide service request under the E-rate Program must provide a Form 470 that lists the specific services for which the applicant anticipates seeking E-rate discounts. In both cases, the applicants had submitted a Form 470 that listed every service or product eligible for discounts, rather than only those services or products that were consistent with the applicants' technology plans. The Commission found that such comprehensive lists did not comport with the competitive bidding requirements under the E-rate Program.⁵⁷

The Commission, however, did not invalidate the applicants' Form 470 applications based upon this error.⁵⁸ Instead, it acknowledged that the SLD had previously granted funding requests based upon Form 470s that listed most or all possible services or products eligible for discounts under the E-rate Program and that participants in the Program could have reasonably relied on those approvals.⁵⁹ The Commission determined that such all-inclusive Form 470s "should not be permitted on a going-forward basis."⁶⁰ The Commission therefore "clarif[ied] prospectively that requests for service on the FCC Form 470 that list all services eligible for funding under the E-rate Program do not comply with the statutory mandate."⁶¹ The Commission in *Ysleta* also provided additional guidance regarding other aspects of the E-rate

⁵⁷ *Ysleta* ¶¶ 26-37; *Winston-Salem* ¶ 13.

⁵⁸ As discussed below, the Commission did conclude in *Ysleta* that the applicants violated the E-rate Program's rules, although not because of the broad list of services included in the applicants' Form 470s. *Ysleta* ¶ 31.

⁵⁹ *Ysleta* ¶ 35; *see also Winston-Salem* ¶ 13.

⁶⁰ *Ysleta* ¶ 35; *see also Winston-Salem* ¶ 13.

⁶¹ *Id.* ¶ 36 (citation omitted); *see also Winston-Salem* ¶ 13.

Program rules “to provide greater clarity to *those applicants re-bidding services and future applicants*.”⁶²

It is patently clear that the Commission intended for its precedent in *Ysleta* and *Winston-Salem* to apply to pending or future applications and not applications that have already been granted and funded. Similarly, the Commission should conclude that the SLD cannot retroactively apply the Administrator’s current interpretations of prohibited associations to Union Parish’s case, if any such interpretations can even be found to apply. As in *Ysleta* and *Winston-Salem*, the Commission has never determined that such passive unitholder interest creates an improper association between an applicant and service provider. Furthermore, Union Parish’s funding requests were approved and monies were allocated to Send well before the Commission announced in *Carethers* that certain associations between applicants and service providers could violate the E-rate Program’s competitive bidding rules. Union Parish and Send (and possibly other E-rate participants) relied on the competitive bidding rules, and interpretations thereof, that were current in 1999 and reasonably interpreted them to support the conclusion that the type of association presented in Union Parish and Send’s case was permissible – especially since state and local procurement guidelines also were observed and no conflict of interest was found to exist by the state of Louisiana.

The Commission in *Ysleta* also concluded that the applicants’ use of a particular bidding process (called a two-step Systems Integration process) did not satisfy the Commission’s and the SLD’s competitive bidding rules because the applicants could not in fact seek competitive bids

⁶² *Ysleta* ¶ 59 (emphasis added). The Commission also noted that the “SLD will carefully scrutinize *applications*” to ensure that they comply with the clarifications elucidated in this case. *Id.* ¶ 65 (emphasis added). If the Commission wanted the SLD to apply those clarifications retroactively to prior SLD decisions, it would have specifically directed the SLD to do so.

under that process.⁶³ The Commission held that because the applicants had violated the competitive bidding rules, their funding requests must be denied. It rejected the argument that it could not apply the E-rate Program rules to the applicants' pending funding requests in an adjudicatory context. According to the Commission, "[t]he fact that in prior years, [the SLD] did not disapprove applications that utilized the procurement processes at issue in no way limits our discretion to apply our *existing rules*."⁶⁴ Because the SLD, however, did previously approve funding requests that utilized a Systems Integration process, the Commission granted the applicants' a waiver of the filing window, allowing the applicants to re-file for E-rate support.⁶⁵

The Commission's precedent in these cases demonstrates that it intends for current E-rate Program rules to be applied to pending and future applications. Send does not dispute that the Commission can apply its existing rules and precedent in an adjudicatory proceeding concerning pending applications. In this case, however, Union Parish's funding requests were approved long before the current precedent on associations between applicants and service providers was developed and the funding requests are no longer pending applications. In no part of *Ysleta* did the Commission direct the SLD to apply its current holding to applications that had already been granted and funded. Although the Commission specifically noted that other parties had previously used this System Integration process and had their funding requests approved, there is no indication that the Commission ever considered revisiting those decisions. Accordingly, the

⁶³ The Commission found that the applicant was seeking only bids for a vendor to serve as its System Integrator and not bids for all services listed on its Form 470. *Ysleta* ¶ 25.

⁶⁴ *Id.* ¶ 58 (emphasis added).

⁶⁵ *Id.* ¶¶ 66-74. See part IV.E. below for further discussion on the Commission's grant of a waiver in *Ysleta*.

Administrator's attempt to apply current rules to re-open and invalidate Union Parish's applications which were granted and funded years ago should be prohibited.

The Commission also must consider the long term impact on the E-Rate Program if it does not reverse the Administrator's decision in the Union Parish case. Specifically, it will raise serious questions for other participants in the E-rate Program about whether they can ever rely upon actions taken by the SLD. Allowing the Administrator's decision to stand would mean that the SLD and the Administrator can retroactively deny previously granted applications based upon rules and precedent adopted after the applications are approved. In the face of such regulatory uncertainty, service providers could certainly conclude that the risk of devoting resources to provide E-rate services is too great. Schools, libraries, students and faculty would be those that ultimately suffer.

3. The Administrator has Advocated Applying Only Program Rules Relevant to a Particular Funding Year to Its Own Audits.

The concept of the SLD applying E-rate Program rules that were in effect only for a particular funding year to judge compliance with its program is something USAC, itself, has advocated for its own audits of E-rate Program compliance. In USAC's November 26, 2003 report to the Commission entitled "*Task Force on the Prevention of Waste, Fraud and Abuse*," the Task Force recommends that it develop audit policies that:

reflect compliance with the rules that existed during the funding year to which the funding was associated and to better communicate the degree of program compliance . . . The Task Force believes that program audits, which are a necessary part of waste, fraud and abuse prevention, need to focus on the policies, procedures, eligible services, etc., that existed during the funding year that is being audited. Measuring program compliance

against policies, procedures, eligible services, etc. which were not in place during a particular funding year is inherently unfair and invalid.⁶⁶

This approach should apply equally to participants in the E-rate Program like Union Parish.

D. Did the Administrator Exceed its Authority by Interpreting the FCC's Competitive Bidding Rules as Including Part 48 Federal Acquisition Planning Rules?

In its denial of Send's Appeal, the Administrator relied in part on federal procurement rules contained in Part 48 of the Code of Federal Regulations. Citing 48 C.F.R. §§ 9.505(a) and (b), the Administrator supports its assertion that Union Parish and Send violated the competitive bidding rules:

Conflict of interest principles that apply in competitive bidding situations include preventing the existence of conflicting roles that could bias a contractor's judgment, and preventing unfair competitive advantage.

As previously stated, USAC is not empowered to make policy, interpret any unclear rule promulgated by the Commission⁶⁷ or to create the equivalent of new guidelines.⁶⁸ In its denial of Send's Appeal, it appears the Administrator exceeds its authority by applying the federal procurement rules and creating the equivalent of new guidelines for the E-rate Program.

⁶⁶ *Recommendations of the Task Force on the Prevention of Waste, Fraud and Abuse*, CC Docket No. 02-6 at 10 (Nov. 26, 2003). The Task Force also makes a number of other recommendations to improve the schools and libraries program, concluding that "the program's competitive bidding process is not working as effectively as policy makers had intended." *Id.* at 5. "The Task Force believes there needs to be greater clarification of program rules, along with increased strong program support staff and educational outreach to further ensure optimal usage of program resources." *Id.* "Prior to the start of the annual training cycle, the SLD needs to provide clear policy, procedures, eligible services list, etc. for the upcoming program year and work to minimize the need for clarifications of the rules during the Program Integrity Assurance review process." *Id.* at 6. "The Task Force believes that if applicants have a better understanding of the rules and standards that will be applied, they will be better equipped to obey them. Providing clarity at the beginning of the cycle will also help avoid the waste associated with pursuing appeals that result from a misunderstanding of the rules." *Id.*

⁶⁷ 47 C.F.R. § 54.702(c).

⁶⁸ *NECA Third Report and Order*, 13 FCC Rcd at 25066-67.

First, Snell did not have “conflicting roles” for Union Parish and Send. Snell was an employee only of Union Parish. He was not a representative, agent or employee of Send and he had no management responsibilities for Send. Furthermore, the State of Louisiana ruled that Snell had no conflict of interest. These state law interpretations on such matters *do* apply under the FCC’s competitive bidding rules.

The facts of this case demonstrate that Union Parish complied, in good faith, with the FCC’s competitive bidding rules, local and state procurement rules, and the SLD’s Program rules regarding competitive bidding that were in effect for the funding year in question. Yet the Administrator, instead of applying the relevant rules for the relevant time periods to Union Parish’s case, disregards the rights of Union Parish and Send and applies a wholly inapplicable statute. In its *Universal Service Order* regarding the universal service support mechanism and the E-rate Program, the Commission specifically stated that Part 48 of the Code of Federal Regulations is “inapplicable” to the schools and libraries program.⁶⁹ The Administrator exceeded its authority when it applied Part 48 rules to the Union Parish case.

E. Do the Facts in Union Parish’s Case Warrant Waiver of the Commission’s Competitive Bidding Rules?

The competitive bidding rules were followed in Union Parish’s case and, in fact, the service contracts to Send were awarded after a full, fair and open competitive bidding process. If, however, the Commission determines that by listing Snell as a contact person on Union Parish’s Form 470s violated the letter and the spirit of the competitive bidding rules because Send later decided to bid for Union Parish’s services, then Send requests that the Commission waive the competitive bidding rules in this case. As further discussed below, the harm resulting

⁶⁹ *Universal Service Order*, 12 FCC Rcd at 9029-30.

from rescinding the monies allocated to Union Parish and Send far outweigh any purported benefit in denying the waiver. It is in the public interest to grant a waiver of the Commission's competitive bidding requirements in this case.

Pursuant to Section 1.3 of its rules, the Commission may waive one of its rules or procedures when good cause is shown.⁷⁰ The U.S. Court of Appeals for the District of Columbia has found that a waiver is appropriate "if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest."⁷¹ Furthermore, there must be a rational policy supporting the grant a waiver.⁷² In reviewing a waiver request, the Commission also can weigh "considerations of hardship, equity, or more effective implementation of overall policy."⁷³ Send's waiver request meets this standard and should therefore be granted.

Grant of a waiver in this case will serve the public interest. As previously discussed, there is no way Union Parish could have known when it filed its Form 470 that listing Snell, an employee of Union Parish, would create a potential competitive bidding issue solely because Send would later choose to bid on Union Parish's services. Snell is a minority unitholder of Send and does not participate in the general business operations of the company. Snell is not a representative or employee of Send. There are no federal rules applicable to the E-rate Program that discuss conflicts of interest, nor were there Support Mechanism rules discussing the same in 1999. Furthermore, the Louisiana Ethics Board reviewed the facts of this case and found that

⁷⁰ 47 C.F.R. § 1.3.

⁷¹ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 n.3 (D.C. Cir. 1990) ("*Northeast Cellular*"); see also *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 n.8 (D.C. Cir. 1969) ("*WAIT Radio*").

⁷² *Northeast Cellular*, 897 F.2d at 1166; *WAIT Radio*, 418 F.2d at 1159.

⁷³ *WAIT Radio*, 418 F.2d at 1159 n.8.

there was no prohibited conflict of interest. Federal law in these matters, to the extent any existed, do not preempt state law. As previously discussed, Union Parish remained in control of the competitive bidding process and did not delegate to Send any authority with regard to the bidding process. Send also did not intervene in or attempt to influence the competitive bidding process to the detriment of other service providers. In fact, the bids Union Parish accepted from Send were the lowest for the services received from Send in response to the Form 470.

The critical public interest policies served by the Commission's competitive bidding rules are to ensure that schools and libraries seeking support through the E-rate Program obtain the most cost-effective services available, thereby lessening applicants' demands on universal service funds and increasing funds available to other applicants.⁷⁴ Through Union Parish's competitive bidding process, there was fair and open competitive bidding for services, and at the end of the bidding process, Send was found to be most cost-effective choice. Thus, the process Union Parish went through to choose Send explicitly met the public policy objectives that underlay the competitive bidding rules.

Furthermore, the failure to grant a waiver will result in irreparable harm to Send and Union Parish. The SLD's commitment adjustment letters were issued years after the SLD reviewed and approved Union Parish's applications and paid monies for Funding Years 1999 through 2001. Internet access services and internal connections were already provided by Send and paid for by Union Parish. Accordingly, if a waiver is not granted, Send will be forced to return monies for rendered services and backbill Union Parish, who in all likelihood does not have funding in its budget to pay for services rendered years ago. Either Send will be irreparably

⁷⁴ *Universal Service Order*, 12 FCC Rcd at 9029.

harmed, or the students and faculty of Union Parish will be irreparably harmed, which is in direct conflict with the purposes of the E-rate Program.

Although the Commission has considered and rejected waiver requests in prior appeals of SLD funding decisions, the facts of this case are clearly distinguishable from those prior decisions. For example, in the *MasterMind* line of cases, the SLD denied requests for funding that it had yet to allocate to applicants.⁷⁵ The end result in those cases was only that the applicants had to wait another year to apply for and receive funding for services supported by the E-rate Program. In contrast, in the case of Union Parish and Send, the SLD has already reviewed, granted and allocated funds pursuant to Union Parish's Form 470s and Send has already provided services under those grants. To now reverse the SLD's prior approvals and reclaim amounts already paid would be patently unfair and irreparably harm Union Parish and Send.

A waiver in this case also is warranted because the Commission has never explained that listing an employee of the applicant, who has a minority and silent ownership interest in a service provider, as a contact person on a Form 470 violates the E-rate Program's competitive bidding procedures. This is the first instance in which the Commission has had the opportunity to address these novel circumstances. Thus, Union Parish, Send, and other participants in the E-rate Program have had no reason to believe that holding a minority, non-controlling unitholder interest in a service provider may be an impermissible "association" under the Commission's and SLD's rules. The Commission also must consider that, as previously discussed, it did not clarify that being "associated" with a service provider may run afoul of the E-rate Program's competitive bidding requirements until March 2001 in *Carethers*, decided well after Union

⁷⁵ See, e.g., *MasterMind*, 16 FCC Rcd at 4035; *Dickenson*, 17 FCC Rcd at 15750.

Parish submitted and the SLD approved its Form 470s.⁷⁶ At the time Union Parish submitted its Form 470s there was very little information available regarding the competitive bidding process (and no information regarding conflicts of interest or passive unitholder interests by employees of schools or libraries in service providers). Union Parish therefore followed and complied with the competitive bidding rules and the conflict of interest regulations set forth in the state and local procurement guidelines, and it received a favorable ruling from the state on the conflict of interest issue.

The Commission has previously granted waiver requests “in light of the uncertain application of our rules to the novel situation presented.”⁷⁷ For example, in *Ysleta* the Commission directed the SLD to allow certain applicants to reapply for E-rate discounts, even though the Commission concluded that the applicants violated the E-rate Program’s competitive bidding process by using a two-step System Integration approach.⁷⁸ According to the Commission, a waiver was appropriate in *Ysleta* because the applicants were likely confused by the application of a new rule to the novel facts presented in that case.⁷⁹ The Commission should similarly conclude that a waiver is appropriate here because the SLD is applying its rule regarding having an association with a service provider to the novel facts in Union Parish’s and Send’s case.

⁷⁶ *Carethers*, 16 FCC Rcd at 6947-48 (holding that the contact person listed on a Form 470 was likely “associated” with a service provider because the last name of the contact person was the same last name of an employee of the service provider). As previously noted, Union Parish’s Form 470s were submitted on January 22, 1999 and December 1, 1999 and approved by the SLD on July 8, 1999, April 14, 2000 and July 28, 2000.

⁷⁷ *Ysleta* ¶ 72.

⁷⁸ *Id.* ¶ 66.

⁷⁹ *Id.* ¶ 72.

The Commission in *Ysleta* also took into consideration that the applicants relied on the SLD's tacit prior approval of two-step System Integration approach:

The exercise of our discretion to grant such a waiver in this instance is also informed by the extent to which applicants relied upon the fact that other applicants that utilized this approach previously were approved for funding. We have previously considered an applicant's good faith reliance in deciding whether to grant a waiver of our rules. Here, we think that such consideration is appropriate because enforcement of these rules in these circumstances would impose an unfair hardship on these applicants. Accordingly, in light of all these factors, we find that it is in the public interest to grant a waiver of our rules in the novel situation posed by the instant case.⁸⁰

Union Parish continued to submit Form 470s with Snell listed as the contact person for the school system because the SLD continued to approve Union Parish's funding requests. In good faith, Union Parish relied on the SLD's prior approvals of its Form 470s and would not have submitted additional funding requests had it thought or known that listing Snell as its contact person violated the intent of the E-rate Program's competitive bidding process. In reliance on the granted and funded applications, valuable services were rendered and paid for. As in *Ysleta*, the Commission should therefore consider Union Parish's reliance on the rules and interpretations regarding competitive bidding and conflicts of interest that were available in 1999, and the SLD's grant of Union Parish's applications in 1999 and 2000, and grant this waiver request.

⁸⁰ *Id.* ¶ 73 (citations omitted).

IV. RELIEF SOUGHT.

Pursuant to Section 254 of the Act⁸¹ and Section 54.719 of the Commission's rules,⁸² Send requests that the Commission reverse the Administrator's decision denying Send's Appeal and direct the SLD to withdraw the CALs it issued to Send and Union Parish. If, however, the Commission does not overturn the Administrator's decision, Send requests a waiver of the E-rate Program's competitive bidding rules.

V. CONCLUSION.

The Commission should overturn the Administrator's decision, and direct the SLD to withdraw the CALs because: (1) There was no prohibited conflict of interest under applicable law that compromised Union Parish's competitive bidding process; (2) Union Parish complied with the letter and spirit of all applicable competitive bidding rules and the intent underlying such rules; (3) Later-adopted Commission precedent regarding the competitive bidding rules, including the *MasterMind* cases, is inapplicable to Union Parish's granted applications and involves easily distinguishable facts; (4) The SLD and the Administrator exceeded their authority when they interpreted current Commission precedent regarding the competitive bidding rules and retroactively applied such interpretations to Union Parish's E-rate applications granted in 1999

⁸¹ 47 U.S.C. § 254.

⁸² 47 C.F.R. § 54.719 (providing that any party aggrieved by an SLD or USAC decision may seek redress from the Commission).

and 2000; and (5) The Administrator exceeded its authority when it justified its actions in the Union Parish case by relying on Part 48 regulations that are wholly inapplicable to the E-rate Program.

Respectfully submitted,

/s/ Jennifer L. Richter

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December 16, 2003

DECLARATION OF Union Parish Superintendent

Union Parish Superintendent, being duly sworn, declares as follows:

1. My name is Tom Snell. I am the Superintendent of the Union Parish School Board ("Union Parish). My office address is 1206 Marion Hwy. Farmerville, LA 71241. I submit this declaration in support of the Consolidated Request for Review, dated December 16, 2003 ("Request for Review").
2. All of the facts set forth in the Request for Review in the section titled "Statement of Facts" including the information pertaining to the competitive bidding process undertaken by Union Parish School Board under the E-rate Program, are true and correct to the best of my knowledge.
3. I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 16th day of December, 2003.



Tom Snell

DECLARATION OF Union Parish Business Manager

Union Parish Business Manager, being duly sworn, declares as follows:

1. My name is Donna Cranford. I am the Business Manager of the Union Parish School Board ("Union Parish). My office address is 1206 Marion Hwy. Farmerville, LA 71241. I submit this declaration in support of the Consolidated Request for Review, dated December 16, 2003 ("Request for Review").
2. All of the facts set forth in the Request for Review in the section titled "Statement of Facts" including the information pertaining to the competitive bidding process undertaken by Union Parish School Board under the E-rate Program, are true and correct to the best of my knowledge.
3. I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 16th day of December, 2003.


Donna Cranford

DECLARATION OF MARK STEVENSON

Mark Stevenson, being duly sworn, declares as follows:

1. My name is Mark Stevenson. I am president of Send Technologies LLC ("Send"). My office address is 2904 Evangeline Street, Monroe LA 71201.. I submit this declaration in support of the Consolidated Request for Review, dated December 16, 2003 ("Request for Review").
2. All of the facts set forth in the Request for Review in the section titled "Statement of Facts" concerning Send's participation in the competitive bidding process as a bidder, and its provision of services to Union Parish School Board under the E-rate Program, are true and correct to the best of my knowledge.
3. I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 16th day of December, 2003.


Mark Stevenson

CERTIFICATE OF SERVICE

I, Caitlin A. Coyle, do hereby certify that I have on this 16th day of December, 2003, had copies of the foregoing **CONSOLIDATED REQUEST FOR REVIEW** delivered to the following via electronic mail or First Class Mail (*), as indicated:

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_____/s/ Caitlin A. Coyle_____
Caitlin A. Coyle